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In the Supreme Court of the United States

OCTOBER TERM 1966

No. 1312

GEORGE L. WARN,

Petitioner,

v.

BROOKS-SCANLON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, GEORGE L. WARN, plaintiff-appellant below, respectfully prays a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on January 26, 1967.

OPINION BELOW

The opinion and supplemental opinion of the United States District Court for the District of Oregon

granting summary judgment dated June 29, 1966 and August 1, 1966, respectively and dismissing the cause are reported at 256 F. Supp. 690 and are appended at pages 9 to 15.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court is reported at — F.2d — and is appended at page 16.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered January 26, 1967.

Jurisdiction of the United States District Court for the District of Oregon is based on Title 28 U.S.C.A., Section 1332, original jurisdiction in civil action where the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs between citizens of different states.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28 U.S.C.A. 1291.

This court has jurisdiction to review the judgment in question by writ of certiorari based on Title 28 U.S.C.A. 1254 (1) because it involves an important question concerning the interpretation of an Oregon statute which permits a plaintiff an additional one year's time to commence a new action if dismissed upon trial or upon appeal even though the applicable statute of limitations would otherwise have run.

QUESTION PRESENTED

Whether a plaintiff in Oregon is permitted an additional one year's time to refile his action after applying for and obtaining an order of voluntary nonsuit prior to the commencement of a trial on an issue of fact where the applicable statute of limitations would otherwise have run.

STATUTES INVOLVED ARE:

1. ORS 12.110 (1):

"An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit."

2. ORS 12.220:

"Except as otherwise provided in ORS 72.-7250, if an action is commenced within the time prescribed therefor and the action is dismissed upon the trial thereof, or upon appeal, after the time limited for bringing a new action, the plaintiff, or if he dies and any cause of action in his favor survives, his heirs or personal representatives, may commence a new action upon such cause of action within one year after the dismissal or reversal on appeal; however, all defenses that would have been available against

the action, if brought within the time limited for the bringing of the action, shall be available against the new action when brought under this section."

3. ORS 17.020:

"Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law shall be first tried, unless the court otherwise directs."

4. ORS 17.025:

"A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact."

STATEMENT OF THE CASE

Petitioner, plaintiff, was injured in an accident April 1, 1963, while an employee of respondent, defendant. On January 13, 1964, petitioner filed an action in the Circuit Court of the State of Oregon, for the County of Deschutes, to recover damages for said injuries; respondent was served with summons and complaint on March 5, 1964. On February 3, 1966, the Honorable Robert H. Foley, Circuit Court judge for the County of Deschutes on Appellant's Motion signed an order of voluntary non-suit; on February 25, 1966, petitioner filed his complaint in the United States District Court, for the District of Oregon commencing the case which is the subject matter of this petition for writ of certiorari.

Thereafter respondent filed a motion for sum-

mary judgment setting forth that the Oregon two-year statute of limitations had run on petitioner's claim; the District Court granted summary judgment in favor of respondent and dismissed the cause concluding that petitioner did not have an additional year in which to refile since the voluntary non-suit was granted prior to the commencement of the trial on an issue of fact.

Petitioner by motion to reconsider supported by the affidavit of one of petitioner's attorneys directed the District Court's attention to the fact that respondent had filed a general demurrer to the petitioner's fourth amended complaint in the Deschutes County Circuit Court case which demurrer was overruled by the Circuit Court November 19, 1964, and that petitioner did not file an amended complaint prior to the entry of the order of voluntary non-suit; petitioner contended by reason thereof that the Circuit Court action was dismissed upon the "trial thereof" within the meaning of ORS 12.220. The District Court, in its supplemental opinion and order, denied petitioner's motion for a reconsideration, affirming its earlier ruling.

This case involves construction of ORS 12.220.

REASONS FOR GRANTING THE WRIT

The question presented is of great concern to the Oregon Bar and litigants in Oregon.

In Oregon an action for personal injuries must be commenced within two years. ORS 12.110 (1).

However, the plaintiff has an additional one year in which to commence an action even though the applicable statute of limitations would otherwise have run if the plaintiff's action is dismissed upon the trial thereof. ORS 12.220.

The decision of the courts below in this case is that if an action is timely commenced and later dismissed that if the applicable statute of limitations would otherwise have run, the plaintiff may have an additional year's time to refile only when a non-suit or dismissal is granted after the commencement of the trial on an issue of fact or the case reversed on appeal.

The decision of the courts below limit the word "trial" to proceedings on an issue of fact. *State* v. *Pacific Livestock Co.*, 93 Or. 196, 182 P. 823.

The decisions in the courts below are in conflict with the interpretation by the Oregon court of ORS 12.220 in *White* v. *Pacific Tel and Tel Co.*, 168 Or. 371, 123 P.2d 193 (1942) wherein the court stated:

> "That section applies only when an action has been commenced within the time prescribed by the statute and has been dismissed *without a trial upon the merits*, such as in a case when judgment of non-suit is given, or when an action is dismissed for want of prosecution for want of jurisdiction, and the like, and it has no application to a judgment entered after a trial upon the merits. In all these latter cases, the judgment of dismissal does not conclude the plaintiff's right of action and leaves the right of action

> open the same as if no proceedings thereon had ever been had. . . ." (emphasis added)

and with ORS 17.025 wherein trial is defined as a judicial examination of the issues between parties whether they be issues of law or fact.

Furthermore the Deschutes County Circuit Court having overruled a general demurrer filed by the respondent to petitioner's fourth amended complaint prior to the entry of the order of dismissal, and the petitioner not having thereafter amended his said fourth amended complaint, the trial on an issue of law had been commenced prior to the entry of the order of dismissal. ORS 17.020.

CONCLUSION

Because of the importance to the Oregon Bar and Oregon litigants of the right of a plaintiff to refile an action within one year after obtaining an order of dismissal prior to the commencement of the trial on an issue of fact in those instances when the applicable statute of limitations would otherwise have run, the petitioner respectfully prays that his petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

GEORGE L. WARN, Plaintiff,	)	CIVIL NO. 66-118
v.	)	
BROOKS-SCANLON, INC., a corporation, Defendant.	)	OPINION AND DISMISSAL

KILKENNY, District Judge:

(1) This matter is before the court on the defendant's motion for a summary judgment under Rule 56, F.R.Civ.P., on a theory that the plaintiff's claim is barred by the statute of limitations. This is a diversity case and the Oregon statute[1] must control.

The injury occurred on April 1, 1963, and this action was not commenced until February 25, 1966. Manifestly, the action would be barred, unless plaintiff is protected by the provisions of ORS 12.220.[2]

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[1] ORS 12.110(1).

"(1) An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit."

[2] ORS 12.220.

"Except as otherwise provided in ORS 72.7250.* if an action is commenced within the time prescribed therefor and the action is dismissed upon the trial thereof, or upon appeal, after the time limited for bringing a new action, the plaintiff, or if he dies and any cause of ac-

To evade the bar of ORS 12.110(1) plaintiff shows that he commenced a previous action in the Circuit Court of the State of Oregon for Deschutes County in March, 1964, and that on February 3, 1966, prior to the trial of said action, he applied for, and secured, a voluntary non-suit in the state court case. It follows, he says, that by reason of the non-suit, ORS 12.220 gave him an additional year in which to file this claim. I agree with plaintiff that the non-suit was the equivalent of the "dismissal" mentioned in the escape statute. Quick v. Andresen, 238 Or. 433, 395 P.2d 154 (1964).

The historical background of the statute which plaintiff seeks to invoke, reveals that it originally covered only a plaintiff who was successful in securing a reversal on appeal.[3] The statute was amended in 1921[4] so as to include a plaintiff where the action was commenced within the time prescribed therefor "and the action is dismissed upon *the trial thereof.*"[5]

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tion in his favor survives, his heirs or personal representatives, may commence a new action upon such cause of action within one year after the dismissal or reversal on appeal; however, all defenses that would have been available against the action, if brought within the time limited for the bringing of the action, shall be available against the new action when brought under this section."
* No application.

[3] Olson, Oregon Laws, § 21.
"If an action shall be commenced within the time prescribed therefor, *and a judgment therein for the plaintiff be reversed on appeal,* the plaintiff, or if he die, and the cause of action survives, his heirs or personal representatives may commence a new action within one year after the reversal." (Emphasis supplid.)

[4] Oregon Laws, 1921, Chapter 6.

[5] The amendment of 1961, Chapter 726, is of no importance.

Under Oregon law, plaintiff is entitled to a voluntary non-suit as a matter of right, at any time prior to the commencement of the trial on the facts. ORS 18.230(1). Pfleeger v. Swanson, 229 Or. 254, 367 P.2d 406, 1 A.L.R.3d 707 (1961). However, once the trial is commenced, the granting or refusal or a non-suit is in the sound discretion of the court. ORS 18.230(1); Pfleeger v. Swanson, supra.

All three statutes, being *in pari materia*, should be construed together. To construe the statutes in conformity with the plaintiff's argument, would, of necessity, circumvent and destroy the obvious intent behind the legislation. If plaintiff's construction is permitted, then a litigant could indefinitely extend the time, by filing and taking a voluntary non-suit each year.

The only reasonable construction which can be placed on ORS 12.220, is one which permits a plaintiff an additional one year's time only when the non-suit (dismissal) is granted after the commencement of a trial on an issue of fact. At that time, of course, the allowance of a dismissal is subject to the discretion of the court and entirely under its control. If such was not the intention of the legislature, the use of the language "dismissed upon the trial thereof" was completely without meaning. The word "trial" has a well defined legal meaning, and that definition must be applied in construing the statute. Cordon v. Gregg, 164 Or. 306, 97 P.2d 732, 101 P.2d 414 (1940). The main object of a statute of limitations is to limit the time in which a party may prosecute

an action. Such being the object which the statute was designed to accomplish, the statute should be construed so as to effectuate that object. Swift & Co. v. Peterson, 192 Or. 97, 233 P.2d 216 (1951); Wimer v. Miller, 235 Or. 25, 383 P.2d 1005 (1963); Pfleeger v. Swanson, supra.

I find nothing in Quick v. Andresen, supra, relied on by plaintiff, which alters the views previously expressed. For that matter, that case supports my conclusions. There, the non-suit was granted on the "trial." In Oregon, the defense of the statute of limitations is not a technical one in the invidious sense of that word, but is considered meritorious since statutes of limitations are looked on, in that state, with favor as statutes of repose. Eastman v. Crary, 131 Or. 694, 284 P. 280 (1930); King v. Mitchell, 188 Or. 434, 442, 214 P.2d 993, 216 P.2d 269, 16 A.L.R.2d 1128 (1949).

A motion for a summary judgment being a proper method by which to raise the legal question, Gifford v. Travelers Protective Ass'n of America, 153 F.2d 209 (9th Cir. 1946); Creditors Committee of Horton Brown Corp. v. Goodhart, 98 U.S. App. D.C. 144, 233 F.2d 23 (1956), the defendant's motion must be allowed.

It is ordered that summary judgment be granted against plaintiff and this cause dismissed.

DATED this 29th day of June, 1966.

JOHN F. KILKENNY
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

GEORGE L. WARREN, *Plaintiff,* v. BROOKS-SCANLON, INC., a corporation, *Defendant.*	Civil No. 66-118 SUPPLEMENTAL OPINION AND ORDER

KILKENNY, District Judge:

Plaintiff's motion for reconsideration urges that a *trial* is a judicial examination of an issue of either law or fact,[1] Mursener v. Redding, 176 Or. 617, 631, 160 P.2d 307 (1945), and that issues of law and of fact may arise on different parts of the pleadings in the same action.[2] Furthermore, that a determination of an issue presented by a general demurrer to a complaint is a trial. Hume v. Woodruff, 26 Or. 373, 375, 38 P. 191 (1894).

Citing these authorities, the defendant calls attention to the state court's ruling on defendant's general demurrer to the plaintiff's fourth amended complaint and says such action constituted a "trial" within the exception of ORS 12.220.

ORS 17.020 and ORS 17.025, trace their ancestry to Deedy and Lane, General Laws of Oregon, 1943-1872, Chapter II, Title 1, § 175 and § 174.

Conversely, ORS 12.120(1) and ORS 12.220 trace

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[1] ORS 17.025.
[2] ORS 17.020.

their ancestry to Chapter I, Title 1, § 21, of the same work.

In other words, Chapter I, Title 1, of the Deedy and Lane Code, dealt exclusively with statutes of limitation, while Chapter II, Title 1, of the same Code dealt with issues and the mode of trial. Of significance, and as mentioned in my previous opinion, the word "trial" was nowhere used in any one of the original provisions of the Oregon statutes touching on limitations, nor was this word used in those statutes until the 1921 amendment.

I believe the decision in State v. Pacific Live Stock Co., 93 Or. 196, 182 P. 828 (1919), is a complete answer to the plaintiff's contentions There, it was held that a "trial," on a motion for a non-suit, meant a proceeding on all issues of fact. The statutes on which plaintiff relies were fully analyzed in the *Pacific Live Stock* decision. That case was decided approximately two years prior to the 1921 amendment to ORS 12.220. Consequently, we must assume that the Oregon Legislature had the *Pacific Live Stock* definition in mind at the time it used the word "trial" in the 1921 amendment.

Plaintiff's argument might be meritorious if the statutes had a common ancestry and if *Pacific Live Stock* had not been decided before the 1921 amendment.

The language of Hume v. Woodruff, supra, cited with pride by plaintiff, was pungently criticized, if not completely overruled, in *Pacific Live Stock.*

The motion for reconsideration is denied.

DATED this 1st day of August, 1966.

/s/ JOHN F. KILKENNY
District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE L. WARN, *Appellant*,	)	No. 21,262
v.	)	
BROOKS-SCANLON, INC., a corporation, *Appellee.*	)	ORDER AFFIRMING

PER CURIAM:

The judgment dismissing the action is affirmed for the reasons stated in the district court's opinion, Warn v. Brooks-Scanlon, Inc., D.C. Ore., 256 F. Supp. 690.

/s/ RICHARD H. CHAMBERS
/s/ FREDERICK G. HAMLEY
/s/ CHARLES M. MERRILL